



## **EXECUTIVE OFFICE OF THE PRESIDENT**

### **Office of National Drug Control Policy**

#### **21 CFR Part 1401**

#### **RIN 3201-AA01**

### **Freedom of Information Act**

**AGENCY:** Office of National Drug Control Policy.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of National Drug Control Policy (ONDCP) is updating its Freedom of Information Act (FOIA) implementing regulation to comport with the FOIA Improvement Act of 2016 and best practices. The proposed rule describes how to make a FOIA request with ONDCP and how the Office of General Counsel, which includes the ONDCP officials authorized to evaluate FOIA requests, processes requests for records. The proposed rule also states ONDCP's Privacy Act Policies and Procedures. The proposed rule describes how individuals can find out if an ONDCP system of records contains information about them and, if so, how to access or amend a record. ONDCP seeks comments on all aspects of the proposed rule and will thoroughly consider all comments that are submitted on time.

**DATES:** Send comments on or before June 30, 2020.

**ADDRESSES:** You may send comments, identified by RIN number 3201-AA01 and/or docket number ONDCP-2020-002, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- E-mail: [OGC@ondcp.eop.gov](mailto:OGC@ondcp.eop.gov) Include docket number ONDCP-2020-002 and/or RIN number 3201-AA01 in the subject line of the message.
- Mail: Executive Office of the President, Office of National Drug Control Policy, 1800 G Street, NW, 9th Floor, Washington DC 20006.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov> including any personal information provided.

ONDCP strongly recommends using electronic means for submitting comments. Due to COVID-19, comments submitted through conventional mail delivery services may not be received in a timely manner.

**FOR FURTHER INFORMATION CONTACT:** Questions concerning this notice should be directed to Michael J. Passante, Acting General Counsel, Office of General Counsel, Office of National Drug Control Policy, Executive Office of the President, at (202) 395-6622 or [OGC@ondcp.eop.gov](mailto:OGC@ondcp.eop.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

ONDCP has undertaken a review of agency practices related to the collection, use, protection and disclosure of ONDCP records and information in light of the FOIA Improvement Act of 2016 and the Privacy Act. As a result of that review, ONDCP is updating its regulation on FOIA and the Privacy Act. The FOIA, 5 U.S.C. 552 *et seq.*, provides a right of access to certain records and information Federal agencies maintain and control. The FOIA requires each Federal agency to publish regulations describing

how to submit a FOIA request and how people responsible for FOIA will process these requests. ONDCP's current FOIA regulation, codified at 21 CFR part 1401, was last revised in 1999. *See* 64 FR 69901 (Dec. 15, 1999). Due to the passage of time and amendments to the FOIA, we are updating the regulation. ONDCP's proposed regulation on FOIA and the Privacy Act incorporates the practical experience of the agency's staff who handle FOIA and privacy issues and guidance from the Office of Management and Budget and the U.S. Department of Justice, Office of Information Policy. It also strives for consistency with FOIA and Privacy Act regulations among other agencies of the Executive Office of the President.

## **II. Section-by-Section Analysis**

### **Subpart A – Freedom of Information Act Policies and Procedures**

*Section 1401.1—Purpose:* This section describes the purpose of the regulation, which is to implement the FOIA.

*Section 1401.2—ONDCP: Organization and functions:* This section describes the mission and leadership structure of the agency. It specifies where media inquiries may be submitted and notes that oral requests for information under FOIA will be rejected.

*Section 1401.3—Definitions:* This section defines the key terms used in the regulation.

*Section 1401.4—Access to information:* This section describes the types of information that ONDCP will make available under FOIA.

*Section 1401.5—Proactive disclosures:* This section describes information about ONDCP the public can access without filing a FOIA request. Pursuant to the FOIA Improvement Act of 2016, ONDCP will make records available that have been requested three or more times in an electronic format.

*Section 1401.6—Records requiring consultation.* This section describes how ONDCP will process records that originated with another agency but are in the custody of ONDCP.

*Section 1401.7—How to request records—Form and content:* This section explains what an individual must do to submit a valid FOIA request to ONDCP and where a request should be sent. It also describes the information requesters must provide so ONDCP can identify the records sought and process their requests.

*Section 1401.8—Initial determination:* This section provides that the ONDCP General Counsel has the authority to approve or deny FOIA requests and describes how to appeal FOIA decisions made by the General Counsel.

*Section 1401.9—Response—form and content:* This section explains that ONDCP will respond to your request in writing either with the requested records or an explanation of the reasons why all or portions of the requested records were not disclosed. We also will provide information about the right of appeal and the mediation services offered by the Office of Government Information Services of the National Archives and Records Administration. The response will include any fees associated with the FOIA request.

*Section 1401.10—Expedited Process:* This section describes the circumstances under which expedited processing of a FOIA request may be granted.

*Section 1401.11—Prompt response:* This section describes the period of time within which ONDCP will determine whether it is appropriate to grant or deny a FOIA request, *i.e.*, ordinarily within twenty working days after the date the request is received. If ONDCP determines that a request is denied or that additional time is required to

process the request, it will provide written notification to the requestor with an explanation of the reasons for denial or delay.

*Section 1401.12—Extension of Time:* This section describes and defines the “unusual circumstances” under which ONDCP may extend the time limit for making a determination on a FOIA request.

*Section 1401.13--Appeal procedures:* This section describes when and how a requester may appeal a determination on a FOIA request and how and within what period of time ONDCP will make a determination on an appeal.

*Section 1401.14—Fees to be charged—general:* This section describes the general FOIA processing activities performed by ONDCP personnel and the rates charged by ONDCP to recoup the employee costs associated with responding to FOIA requests.

*Section 1401.15—Fees to be charged—Miscellaneous provisions:* This section contains miscellaneous FOIA fee provisions such as where payment should be sent, when advance payment is required, and rates of interest charged on late payments, etc.

*Section 1401.16—Fees to be charged—Categories of Requester:* This section describes the different categories of requesters and the types and amounts of fees ONDCP may assess to process and respond to a FOIA request.

*Section 1401.17--Restrictions on charging fees.* This provision describes the circumstances under which ONDCP is restricted in charging fees normally associated with processing FOIA request such as when ONDCP does not meet time limits mandated by the FOIA.

*Section 1401.18—Waiver or Reduction of Fees:* This section describes the factors that ONDCP may consider when deciding whether to waive or reduce the fees associated with processing FOIA requests.

*Section 1401.19—Aggregation of requests:* This section describes the circumstances under which ONDCP may aggregate a series or group of requests for purposes of fee assessment.

*Section 1401.20—Deletion of exempted information:* This section provides that ONDCP will redact exempt information from its FOIA disclosures to the extent that exempt information can be segregated from other information subject to disclosure.

*Section 1401.21—Confidential commercial information:* This section explains when and how a person or entity that submits information to ONDCP must identify confidential commercial information. It also describes how ONDCP staff will handle such information.

## **Subpart B – Privacy Act Policies and Procedures**

*Section 1401.22—Definitions:* This section defines the key terms used in this Subpart.

*Section 1401.23—Purpose and scope:* This section describes the purpose of the regulation, which is to implement the Privacy Act, and explains general policies and procedures for individuals requesting access to records, requesting amendments or corrections to records, and requesting an accounting of disclosures of records.

*Section 1401.24—How do I make a Privacy Act request?:* This section explains what an individual must do to submit a request to ONDCP for access to records, to amend or correct records, or for an accounting of disclosures of records. It also describes the

information an individual must provide so ONDCP can identify the records sought and determine whether the request can be granted.

*Section 1401.25—How will ONDCP respond to a Privacy Act request?:* This section describes the period of time within which ONDCP will respond to requests. It also explains that ONDCP will grant or deny requests in writing, provide reasons if a request is denied in whole or in part, and explain the right of appeal.

*Section 1401.26— What can I do if I am dissatisfied with ONDCP’s response to my Privacy Act request?:* This section describes when and how an individual may appeal a determination on a Privacy Act request and how and within time period ONDCP will make a determination on an appeal.

*Section 1401.27— What does it cost to get records under the Privacy Act?:* This section explains that requesters are required to pay fees for the duplication of requested records.

### **III. Regulatory Flexibility Act**

ONDCP has considered the impact of the proposed rule and determined that if adopted as a final rule it is not likely to have a significant economic impact on a substantial number of small business entities because it only applies to ONDCP’s internal operations and legal obligations. *See* 5 U.S.C. 601 *et seq.*

### **IV. Paperwork Reduction Act**

The proposed rule does not contain any information collection requirement that requires approval from the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

### **List of Subjects in CFR 21 Part 1401**

Freedom of information, Privacy.

For the reasons stated in the preamble, the Office of National Drug Control Policy is proposing to revise part 1401 of title 21 of the Code of Federal Regulations to read as follows:

**PART 1401—PUBLIC AVAILABILITY OF INFORMATION**

**Subpart A — Freedom of Information Act Policies and Procedures**

Sec.

- 1401.1 Purpose.
- 1401.2 The Office of National Drug Control Policy—organization and functions.
- 1401.3 Definitions.
- 1401.4 Access to information.
- 1401.5 Proactive disclosures.
- 1401.6 Records requiring consultation.
- 1401.7 How to request records—form and content.
- 1401.8 Initial determination.
- 1401.9 Responses-form and content.
- 1401.10 Expedited process.
- 1401.11 Prompt response.
- 1401.12 Extension of time.
- 1401.13 Appeal procedures.
- 1401.14 Fees to be charged—general.
- 1401.15 Fees to be charged—miscellaneous provisions.
- 1401.16 Fees to be charged—categories of requesters.
- 1401.17 Restrictions on charging fees.
- 1401.18 Waiver or reduction of fees
- 1401.19 Aggregation of requests.
- 1401.20 Deletion of exempted information.
- 1401.21 Confidential commercial information.

**Subpart B – Privacy Act Policies and Procedures**

- 1401.22 Definitions.
- 1401.23 Purpose and scope.
- 1401.24 How do I make a Privacy Act request?
- 1401.25 How will ONDCP respond to my Privacy Act request?
- 1401.26 What can I do if I am dissatisfied with ONDCP's response to my Privacy Act request?
- 1401.27 What does it cost to get records under the Privacy Act?

Authority: 5 U.S.C. 552

**Subpart A — Freedom of Information Act Policies and Procedures**



**§ 1401.1 Purpose.**

The purpose of this part is to prescribe rules, guidelines and procedures to implement the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552.

**§ 1401.2 The Office of National Drug Control Policy—organization and functions.**

(a) The Office of National Drug Control Policy (ONDCP) was created by the Anti-Drug Abuse Act of 1988, 21 U.S.C. 1501 et seq., and reauthorized under 21 U.S.C. 1701 *et seq.* and several appropriations acts. The mission of ONDCP is to coordinate the anti-drug efforts of the various agencies and departments of the Federal Government, to consult with States and localities and assist their anti-drug efforts, and to annually promulgate the National Drug Control Strategy. ONDCP is headed by the Director of National Drug Control Policy.

(b) ONDCP's Office of External and Legislative Affairs is responsible for providing information to the press and to the general public. If members of the public have general questions about ONDCP, they may email the Office of External and Legislative Affairs at [mediainquiries@ondcp.eop.gov](mailto:mediainquiries@ondcp.eop.gov). This email address should not be used to make FOIA requests. All oral requests for information under FOIA will be rejected.

**§ 1401.3 Definitions.**

For the purpose of this part, all the terms defined in the Freedom of Information Act apply.

*Commercial-use request* means a request from or on behalf of one who seeks information for a cause or purpose that furthers the commercial, trade or profit interests of the requester or the person or institution on whose behalf the request is made. In

determining whether a requester properly belongs in this category, ONDCP will consider the intended use of the information.

*Direct costs* means the expense actually expended to search, review, or duplicate in response to a FOIA request. For example, direct costs include 116% of the salary of the employee performing work (*i.e.*, the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the actual costs incurred while operating equipment.

*Duplicate* means the process of making a copy of a document. Such copies may take the form of paper, microform, audio-visual materials, or machine-readable documentation. Requesters may specify the preferred form or format (including electronic formats) for the records they seek. ONDCP will try to accommodate formatting requests if the record is readily reproducible in that form or format.

*Educational institution* means preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program or programs of scholarly research.

*Noncommercial scientific institution* means an institution that is not operated on a commercial basis as that term is defined in this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

*OGIS* means the Office of Government Information Services of the National Archives and Records Administration. OGIS offers FOIA dispute resolution services, which is a voluntary process. If ONDCP agrees to participate in the dispute resolution

services provided by OGIS, ONDCP will actively engage as a partner to the process in an attempt to resolve the dispute.

*Records* and any other terms used in this part in reference to information includes any information that would be an agency record subject to the requirements of this part when maintained in any format, including electronic format.

*Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience. The term “news” means information that is about current events or information that would be of interest to the public. Examples of the news media include television or radio stations that broadcast to the public at large and publishers of news periodicals that make their products available to the general public for purchase or subscription. Freelance journalists may be regarded as working for the news media where they demonstrate a reasonable basis for expecting publication through that organization, even though not actually employed by it.

*Request* means a letter or other written communication seeking records or information under FOIA.

*Review* means the process of examining documents that are located during a search to determine if any portion should lawfully be withheld. It is the processing of determining disclosability.

*Search* means to review, manually or by automated means, agency records for the purpose of locating those records responsive to a request.

#### **§ 1401.4 Access to information.**

The Office of National Drug Control Policy makes available information pertaining to matters issued, adopted, or promulgated by ONDCP, that are within the scope of 5 U.S.C. 552(a)(2). Such information is located at <https://www.whitehouse.gov/ondcp>.

**§ 1401.5 Proactive disclosures.**

ONDCP will make records that the FOIA requires us to make available for public inspection and copying in an electronic format (with appropriate exemptions applied), through our website: <http://www.whitehouse.gov/ondcp>. These records consist of information that has been requested three or more times or that has been released to a requester and that ONDCP determines has become, or are likely to become, the subject of subsequent requests for substantially the same records.

**§ 1401.6 Records requiring consultation.**

Requests for records that are in ONDCP's custody but in which other agencies have equities shall be reviewed by ONDCP and then ONDCP will either consult with or refer the records to the other agency or agencies for further processing.

**§ 1401.7 How to request records—form and content.**

(a) You must describe the records you seek in sufficient detail and in writing to enable ONDCP personnel to locate them with a reasonable amount of effort. To satisfy this requirement, you should be as detailed as possible when describing the records you seek. To the extent possible, each request must reasonably describe the record(s) sought including the type of document, specific event or action, title or name, author, recipient, subject matter of the record, date or time period, location, and all other pertinent data. Before or after submitting their requests, requesters may contact ONDCP's FOIA Public

Liaison to discuss the records they seek and for assistance in describing the records. A list of Agency FOIA Public Liaisons is available at <https://www.foia.gov/#agency-search>

(b)(1) If you are making a request for records about yourself, you must comply with the verification of identity provision set forth in § 1401.24(f) of this part.

(2) If a request for records pertains to a third party, you may receive greater access by submitting either a notarized authorization signed by that individual or an unsworn declaration under 26 U.S.C. 1746 by that individual authorizing disclosure of the records to you. If the other individual is deceased, you should submit proof of death such as a copy of the death certificate or an obituary. As an exercise of administrative discretion, ONDCP may require you to provide additional information if necessary in order to verify that a particular individual has consented to disclosure.

(c) Whenever it is appropriate to do so, ONDCP automatically processes a Privacy Act request for access to records under both the Privacy Act and the FOIA, following the rules contained in this part. ONDCP processes a request under both the FOIA and Privacy Act so you will receive the maximum amount of information available to you by law.

(d) Requests must be received by ONDCP through methods specified on the FOIA page of ONDCP's website: <https://www.whitehouse.gov/ondcp/about/foia-and-legal/>. Requests may be emailed to [FOIA@ondcp.eop.gov](mailto:FOIA@ondcp.eop.gov).

(e) The words "FOIA REQUEST" or "REQUEST FOR RECORDS" must be clearly marked on all FOIA request communications. The time limitations imposed by § 1401.10 will not begin until the Office of General Counsel identifies a communication as a FOIA request.

(f) You must provide contact information, such as your phone number, email address and mailing address, so we will be able to communicate with you about your request and provide released records. If we cannot contact you, or you do not respond within twenty calendar days to our request for clarification, we will close your request.

(g) To protect our computer systems, we will not open attachments to emailed requests—you must include your request within the body of the email. We will not process email attachments.

**§ 1401.8 Initial determination.**

The General Counsel or his or her designee shall have the authority to approve or deny requests received pursuant to these regulations.

**§ 1401.9 Responses—form and content.**

(a) When a requested record has been identified and is available, the General Counsel or his or her designee shall send the record to the person making the request or notify the person making the request as to where and when the record will be available. The notification shall also advise the person making the request of any fees assessed under § 1401.10 of this part. ONDCP will inform the requester of the availability of its FOIA Public Liaison.

(b) A denial or partial denial of a request for a record shall be in writing signed by the General Counsel or his or her designee and shall include:

(1) The name and title of the person making the determination;

(2) Either a reference to the specific exemption under FOIA authorizing the withholding of the record or a statement that, after diligent effort, the requested records have not been found.

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption. *See* 5 U.S.C. 552(a)(6)(F).

(4) A statement that the denial may be appealed to the Director or his/her designee within 90 days of the date of the response. The requirements for making an appeal are specified in § 1401.13.

(5) A statement notifying the requester of the assistance available from the ONDCP's FOIA Public Liaison and the dispute resolution services offered by OGIS.

**§ 1401.10 Expedited process.**

(a) A request for expedited processing may be made at any time. ONDCP must process requests and appeals on an expedited basis whenever it is determined that they involve:

(1) The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) An urgency to inform the public about an actual or alleged Federal Government activity, beyond the public's right to know about government activity generally, and the request is made by a person primarily engaged in disseminating information.

(b) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for requesting expedited processing. For example, under paragraph (a)(2) of this section, a requester who is not a full-time

member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic. The formality of certification may be waived as a matter of administrative discretion.

(c) Within ten days of receipt of a request for expedited processing, ONDCP will decide whether to grant it and will notify the requester of the decision. If a request for expedited treatment is granted, the request will be given priority and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

**§ 1401.11 Prompt response.**

(a) The General Counsel, or designee, will determine within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of a FOIA request whether it is appropriate to grant the request and will provide written notification to the person making the request. If the request is denied, the written notification will include the names of the individuals who participated in the determination, the reasons for the denial, and that an appeal may be filed with the Office of National Drug Control Policy under § 1401.13.

(b) When additional time is required, the General Counsel or his or her designee shall acknowledge receipt of the request within the 20 working day period and shall



assign the request an individualized tracking number. The acknowledgment will include the tracking number and a brief explanation of the reason(s) for delay. Where the extension exceeds 10 working days, ONDCP must provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. ONDCP will make available its designated FOIA contact or its FOIA Public Liaison for this purpose, and will alert requesters to the availability of the OGIS to provide dispute resolution services.

**§ 1401.12 Extension of time.**

(a) In unusual circumstances, the Office of General Counsel may extend the time limit prescribed in § 1401.7 or § 1401.9 by written notice to the FOIA requester. The notice will state the reasons for the extension.

(b) The phrase “unusual circumstances” means:

(1) The requested records are located in establishments that are separated from the office processing the request;

(2) A voluminous amount of separate and distinct records are demanded in a single request; or

(3) Another agency or two or more components in the same agency have substantial interest in the determination of the request.

(c) Whenever ONDCP cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined by 5 U.S.C. 552(a)(b)(B), and ONDCP extends the time limit on that basis, the agency must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which ONDCP estimates processing of the request will be

completed. Where the extension exceeds 10 working days, ONDCP must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The agency must make available its designated FOIA contact or its FOIA Public Liaison for this purpose. The agency must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(d) To satisfy unusual circumstances under the FOIA, ONDCP may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. ONDCP cannot aggregate multiple requests that involve unrelated matters.

#### **§ 1401.13 Appeal procedures.**

(a) An appeal to the ONDCP must explain in writing the legal and factual basis for the appeal. It must be received by email at FOIA@ondcp.eop.gov or another method specified on the FOIA page of ONDCP's website within 90 days of the date of the response. The appeal must be in writing, addressed to the Director, Executive Office of the President, Office of National Drug Control Policy, 1800 G street, NW, 9<sup>th</sup> Floor, Washington DC 20006, ATTN: Office of General Counsel. The communication should clearly be labeled as a "Freedom of Information Act Appeal."

(b) The Director or designee will decide the appeal within 20 days (excepting Saturdays, Sundays, and legal public holidays). If the Director or designee deny an appeal in whole or in part, the written determination will contain the reason for the denial, the names of the individuals who participated in the determination, and the

provisions for judicial review of the denial and ruling on appeal provided in 5 U.S.C. 552(a)(4). The denial will also inform the requestor of the dispute resolution services offered by OGIS as a non-exclusive alternate to litigation. If ONDCP agrees to participate in voluntary dispute resolution services provided by OGIS, it will actively engage in an attempt to resolve the dispute.

**§ 1401.14 Fees to be charged—general.**

ONDCP will assess a fee to process FOIA requests in accordance with the provisions of this section and OMB Guidelines. We shall ensure that searches, review and duplication are conducted in the most efficient and the least expensive manner. ONDCP will ordinarily collect all applicable fees before sending copies of records to a requester. ONDCP will charge the following fees unless a waiver or reduction of fees is granted under § 1401.18, or the total fee to be charged is less than \$25.00. We will notify you if we estimate that charges will exceed \$25 including a breakdown of the fees for search, review or duplication and whether applicable entitlements to duplication and search at no charge have been provided. We will not process your request until you either commit in writing to pay the actual or estimated total fee, or designate some amount of fees you are willing to pay.

(a) *Manual search for records.* ONDCP will charge \$77.00 per hour, which is a blended hourly rate for all personnel that respond to FOIA requests, plus 16 percent of that rate to cover benefits.

(b) *Computerized search for records.* ONDCP will charge \$77.00 per hour, which is a blended hourly rate for all personnel that respond to FOIA requests, plus 16 percent of that rate to cover benefits.

(c) *Review of records.* ONDCP will charge \$77.00 per hour, which is a blended hourly rate for all personnel that responded to FOIA requests, plus 16 percent of that rate to cover benefits. Records or portions of records withheld under an exemption subsequently determined not to apply may be reviewed to determine the applicability of exemptions not considered. The cost for a subsequent review is assessable.

(d) *Duplication of records.* We will charge duplication fees to all requesters. We will honor your preference for receiving a record in a particular format if we can readily reproduce it in the form or format requested. If we provide photocopies, we will make one copy per request at the cost of \$.10 per page. For copies of records produced on tapes, disks or other media, we will charge the direct costs of producing the copy, including operator time. Where we must scan paper documents in order to comply with your preference to receive the records in an electronic format, we will charge you the direct costs associated with scanning those materials. For other forms of duplication, we will charge the direct costs. We will provide the first 100 pages of duplication (or the cost equivalent for other media) without charge except for requesters seeking records for a commercial use.

(e) *Other charges.* ONDCP will recover the costs of providing other services such as certifying records or sending records by special methods.

**§ 1401.15 Fees to be charged—miscellaneous provisions.**

(a) Payment for FOIA services may be made through the methods specified on the FOIA page of ONDCP's website.

(b) ONDCP may require advance payment where the estimated fee exceeds \$250, or a requester previously failed to pay within 30 days of the billing date.

(c) ONDCP may assess interest charges beginning the 31st day of billing. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the billing.

(d) ONDCP may assess search charges where records are not located or where records are exempt from disclosure.

(e) ONDCP may aggregate individual requests and charge accordingly for requests seeking portions of a document or documents.

**§ 1401.16 Fees to be charged—categories of requesters.**

(a) There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters.

(b) The specific levels of fees for each of these categories are:

(1) *Commercial use requesters.* ONDCP will recover the full direct cost of providing search, review and duplication services. Commercial use requesters will not receive free search-time or free reproduction of documents.

(2) *Educational and non-commercial scientific institution requesters.* ONDCP will charge the cost of reproduction, excluding charges for the first 100 pages. Requesters must demonstrate the request is authorized by and under the auspices of a qualifying institution and that the records are sought for scholarly or scientific research not a commercial use.

(3) *Requesters who are representatives of the news media.* ONDCP will charge the cost of reproduction, excluding charges for the first 100 pages. Requesters must meet the criteria in §1401.3(h), and the request must not be made for a commercial use. A

request that supports the news dissemination function of the requester shall not be considered a commercial use.

(4) *All other requesters.* ONDCP will recover the full direct cost of the search and the reproduction of records, excluding the first 100 pages of reproduction and the first two hours of search time.

**§ 1401.17 Restrictions on charging fees.**

(a) No search fees will be charged for requests by educational institutions (unless the records are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(b) If ONDCP fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in § 1401.16(b)(2), may not charge duplication fees, except as described in paragraphs (c), (d), and (e) of this section.

(c) If ONDCP determines that unusual circumstances as defined by the FOIA apply and the agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(d) If ONDCP determines that unusual circumstances as defined by the FOIA apply, and more than 5,000 pages are necessary to respond to the request, the agency may charge search fees, or, in the case of requesters described in § 1401.16(b)(2) of this section, may charge duplication fees if the following steps are taken. ONDCP must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the agency must have discussed with the requester via written mail,

email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, ONDCP may charge all applicable fees incurred in the processing of the request.

(e) If a court has determined that exceptional circumstances exist as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(f) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(g) When, after first deducting the 100 free pages (or its cost equivalent) and the first two hours of search, a total fee calculated under paragraph (c) of this section is \$25.00 or less for any request, no fee will be charged.

**§ 1401.18 Waiver or reduction of fees.**

Requirements for waiver or reduction of fees:

(a) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(b) ONDCP must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and

is not primarily in the commercial interest of the requester. In deciding whether this standard is satisfied the agency must consider the factors described in paragraphs (b)(1) through (3) of this section:

(1) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(2) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(i) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(ii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. Components will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, components will consider the following criteria:



(i) Components must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest, the component must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of § 1401.17(b)(1) and (2) are satisfied and any commercial interest is not the primary interest furthered by the request. Components ordinarily will presume that when a news media requester has satisfied the requirements of § 1401.17(b)(1) and (2), the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(c) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(d) Requests for a waiver or reduction of fees should be made when the request is first submitted to ONDCP and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received.

**§ 1401.19 Aggregation of requests.**

When an agency reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the agency may aggregate those requests and charge accordingly. Agencies may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, agencies will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

**§ 1401.20 Deletion of exempted information.**

When requested records contain matters that are exempted under 5 U.S.C. 552(b), but such exempted matters can be reasonably segregated from the remainder of the records, the records shall be disclosed by ONDCP with the necessary redactions. If records are disclosed in part, ONDCP will mark them to show the amount and location of information redacted and the exemption(s) under which the redactions were made unless doing so would harm an interest protected by an applicable exemption.

**§ 1401.21 Confidential commercial information.**

(a) *Definitions*—

*Confidential commercial information* means commercial or financial information obtained by ONDCP from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).

*Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides

confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) ONDCP must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if ONDCP determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) ONDCP has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, ONDCP may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) ONDCP determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, ONDCP must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) ONDCP must specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide ONDCP a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as the basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. ONDCP is not required to consider any information received after the date of any disclosure

decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* ONDCP must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever ONDCP decides to disclose information over the objection of a submitter, ONDCP must provide the submitter written notice, which must include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as ONDCP intends to release them; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, ONDCP must promptly notify the submitter.

(i) *Requester notification.* ONDCP must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

(j) *No right or benefit.* The requirements of this section such as notification do not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any person.

## **Subpart B — Privacy Act Policies and Procedures**

### **§ 1401.22 Definitions.**

For purposes of this subpart:

*Access* means making a record available to a subject individual.

*Amendment* means any correction, addition to or deletion of information in a record.

*Individual* means a natural person who either is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence.

*Maintain* includes the term “maintain”, collect, use, or disseminate.

*Privacy Act Office* means the ONDCP officials who are authorized to respond to requests and to process requests for amendment of records ONDCP maintains under the Privacy Act.

*Record* means any item, collection or grouping of information about an individual that ONDCP maintains within a system of records and contains the individual's name or the identifying number, symbol or other identifying particular assigned to the individual, such as a finger or voice print or photograph.

*System of records* means a group of records ONDCP maintains or controls from which information is retrieved by the name of an individual or by some identifying number, symbol or other identifying particular assigned to the individual.

### **§ 1401.23 Purpose and scope.**

This subpart implements the Privacy Act, 5 U.S.C. 552a, a Federal law that requires Federal agencies to protect private information about individuals that the agencies collect or maintain. It establishes ONDCP's rules for access to records in

systems of records we maintain that are retrieved by an individual's name or another personal identifier. It describes the procedures by which individuals may request access to records, request amendment or correction of those records, and request an accounting of disclosures of those records by ONDCP. Whenever it is appropriate to do so, ONDCP automatically processes a Privacy Act request for access to records under both the Privacy Act and the FOIA, following the rules contained in this part. ONDCP processes a request under both the Privacy Act and the FOIA so you will receive the maximum amount of information available to you by law.

**§ 1401.24 How do I make a Privacy Act request?**

(a) *In general.* You can make a Privacy Act request for records about yourself. You also can make a request on behalf of another individual as the parent or legal guardian of a minor, or as the legal guardian of someone determined by a court to be incompetent.

(b) *How do I make a request?—(1) Where do I send my written request?* To make a request for access to a record, you should write directly to our Office of General Counsel. Heightened security delays mail delivery. To avoid mail delivery delays, we strongly suggest that you email your request to foia@ondcp.eop.gov. Our mailing address is: Executive Office of the President, Office of National Drug Control Policy, 1800 G Street, NW, 9th Floor, Washington DC 20006, Attn: Office of General Counsel. To make sure that the Office of General Counsel receives your request without delay, you should include the notation “Privacy Act Request” in the subject line of your email or on the front of your envelope and also at the beginning of your request.

(2) *Security concerns.* To protect our computer systems, we will not open attachments to emailed requests—you must include your request within the body of the email. We will not process email attachments.

(c) *What should my request include?* You must describe the record that you seek in enough detail to enable the Office of General Counsel to locate the system of records containing the record with a reasonable amount of effort. Include specific information about each record sought, such as the time period in which you believe it was compiled, the name or identifying number of each system of records in which you believe it is kept, and the date, title or name, author, recipient, or subject matter of the record. As a general rule, the more specific you are about the record that you seek, the more likely we will be able to locate it in response to your request.

(d) *How do I request amendment of a record?* If you are requesting an amendment of an ONDCP record, you must identify each particular record in question and the system of records in which the record is located, describe the amendment that you seek, and state why you believe that the record is not accurate, relevant, timely or complete. You may submit any documentation that you think would be helpful, including an annotated copy of the record.

(e) *How do I request an accounting of record disclosures?* If you are requesting an accounting of disclosures made by ONDCP to another person, organization or Federal agency, you must identify each system of records in question. An accounting generally includes the date, nature and purpose of each disclosure, as well as the name and address of the person, organization, or Federal agency to which the disclosure was made.



(f) *Verification of identity.* When making a Privacy Act request, you must verify your identity in accordance with these procedures to protect your privacy or the privacy of the individual on whose behalf you are acting. If you make a Privacy Act request and you do not follow these identity verification procedures, ONDCP cannot process your request.

(1) *How do I verify my own identity?* You must include in your request your full name, citizenship status, current address, and date and place of birth. We may request additional information to verify your identity. To verify your own identity, you must provide an unsworn declaration under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury. To fulfill this requirement, you must include the following statement just before the signature on your request:

I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].

(2) *How do I verify parentage or guardianship?* If you make a request as the parent or legal guardian of a minor, or as the legal guardian of someone determined by a court to be incompetent, for access to records or information about that individual, you must establish:

(i) The identity of the individual who is the subject of the record, by stating the individual's name, citizenship status, current address, and date and place of birth;

(ii) Your own identity, as required in paragraph (f)(1) of this section;

(iii) That you are the parent or legal guardian of the individual, which you may prove by providing a copy of the individual's birth certificate showing your parentage or a court order establishing your guardianship; and

(iv) That you are acting on behalf of the individual in making the request.

**§ 1401.25 How will ONDCP respond to my Privacy Act request?**

(a) *When will we respond to your request?* We will search to determine if the requested records exist in a system of records ONDCP owns or controls. The Office of General Counsel will respond to you in writing within twenty days after we receive your request and/or within ten working days after we receive your request for an amendment, if it meets the requirements of this subpart. We may extend the response time in unusual circumstances, such as the need to consult with another agency about a record or to retrieve a record that is in storage.

(b) *What will our response include?* (1) Our written response will include our determination whether to grant or deny your request in whole or in part, a brief explanation of the reasons for the determination, and the amount of the fee charged, if any, under § 1401.27. If you requested access to records, we will make the records, if any, available to you. If you requested amendment of a record, the response will describe any amendments made and advise you of your right to obtain a copy of the amended record.

(2) We will also notify the individual who is subject to the record in writing, if, based on your request, any system of records contains a record pertaining to him or her.

(3) If the Office of General Counsel makes an adverse determination with respect to your request, our written response will identify the name and address of the person responsible for the adverse determination, that the adverse determination is not a final agency action, and describe the procedures by which you may appeal the adverse determination under § 1401.26.

An adverse determination is a response to a Privacy Act request that:

- (i) Withholds any requested record in whole or in part;
- (ii) Denies a request to amend a record in whole or in part;
- (iii) Declines to provide an accounting of disclosures;
- (iv) Advises that a requested record does not exist or cannot be located;
- (v) Finds that what you requested is not a record subject to the Privacy Act; or
- (vi) Advises on any disputed fee matter.

**§ 1401.26 What can I do if I am dissatisfied with ONDCP's response to my Privacy Act request?**

(a) *What can I appeal?* You can appeal any adverse determination in writing to our Director or designee within ninety calendar days after the date of our response. We provide a list of adverse determinations in § 1401.25(b)(3).

(b) *How do I make an appeal?*—(1) *What should I include?* You may appeal by submitting a written statement giving the reasons why you believe the Director or designee should overturn the adverse determination. Your written appeal may include as much or as little related information as you wish to provide, as long as it clearly identifies the determination (including the request number, if known) that you are appealing.

(2) *Where do I send my appeal?* You should mark both your letter and the envelope, or the subject of your email, “Privacy Act Appeal.” To avoid mail delivery delays caused by heightened security, we strongly suggest that you email any appeal to foia@ondcp.eop.gov. Our mailing address is: Executive Office of the President, Office of National Drug Control Policy, 1800 G Street, NW, 9th Floor, Washington DC 20006, Attn: Office of General Counsel.

(c) *Who will decide your appeal?* (1) The Director or designee will act on all appeals under this section.

(2) We ordinarily will not adjudicate an appeal if the request becomes a matter of litigation.

(3) On receipt of any appeal involving classified information, the Director or designee must take appropriate action to ensure compliance with applicable classification rules.

(d) *When will we respond to your appeal?* The Director or designee will notify you of its appeal decision in writing within thirty days from the date it receives an appeal that meets the requirements of paragraph (b) of this section. We may extend the response time in unusual circumstances, such as the need to consult with another agency about a record or to retrieve a record shipped offsite for storage.

(e) *What will our response include?* The written response will include the Director or designee's determination whether to grant or deny your appeal in whole or in part, a brief explanation of the reasons for the determination, and information about the Privacy Act provisions for court review of the determination.

(1) *Appeals concerning access to records.* If your appeal concerns a request for access to records and the appeal is granted in whole or in part, we will make the records, if any, available to you.

(2) *Appeals concerning amendments.* If your appeal concerns amendment of a record, the response will describe any amendment made and advise you of your right to obtain a copy of the amended record. We will notify all persons, organizations or Federal agencies to which we previously disclosed the record, if an accounting of that disclosure

was made, that the record has been amended. Whenever the record is subsequently disclosed, the record will be disclosed as amended. If our response denies your request for an amendment to a record, we will advise you of your right to file a statement of disagreement under paragraph (f) of this section.

(f) *Statements of disagreement*—(1) *What is a statement of disagreement?* A statement of disagreement is a concise written statement in which you clearly identify each part of any record that you dispute and explain your reason(s) for disagreeing with our denial in whole or in part of your appeal requesting amendment.

(2) *How do I file a statement of disagreement?* You should mark both your letter and the envelope, or the subject of your email, “Privacy Act Statement of Disagreement.” To avoid mail delivery delays caused by heightened security, we strongly suggest that you email a statement of disagreement to foia@ondcp.eop.gov. Our mailing address is: Executive Office of the President, Office of National Drug Control Policy, 1800 G Street, NW, 9th Floor, Washington DC 20006, Attn: Office of General Counsel.

(3) *What will we do with your statement of disagreement?* We shall clearly note any portion of the record that is disputed and provide copies of the statement and, if we deem appropriate, copies of our statement that denied your request for an appeal for amendment, to persons or other agencies to whom the disputed record has been disclosed.

(g) *When appeal is required.* Under this section, you generally first must submit a timely administrative appeal, before seeking review of an adverse determination or denial request by a court.

**§ 1401.27 What does it cost to get records under the Privacy Act?**

(a) *Agreement to pay fees.* Your request is an agreement to pay fees. We consider your Privacy Act request as your agreement to pay all applicable fees unless you specify a limit on the amount of fees you agree to pay. We will not exceed the specified limit without your written agreement.

(b) *How do we calculate fees?* We will charge a fee for duplication of a record under the Privacy Act in the same way we charge for duplication of records under the FOIA in § 1401.14(d). There are no fees to search for or review records requested under the Privacy Act.

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Acting General Counsel

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